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In the Supreme Court of the United States

OCTOBER TERM, 1975

OSCAR RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This petition presents the question whether the district court's allegedly premature inspection of a presentence report requires the reversal of petitioner's conviction.

Following a nonjury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of 1,300 pounds of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and of conspiracy to do

the same, in violation of 21 U.S.C. 846. He was sentenced to consecutive terms of four years' imprisonment on each count, to be followed by two years' special parole. He was fined $10,000. The court of appeals affirmed (Pet. App. 15-25).

Petitioner, Leonelo Sanchez, and others were indicted in the Western District of Texas. Another group of defendants, who were alleged to have participated in the same transactions, were indicted in the Southern District of Texas at Brownsville. The second group included Rene Ramirez, petitioner's brother. Pursuant to Fed. R. Crim. P. 21(b), the trial of petitioner's indictment was transferred to Brownsville. The judge to whom the cases were assigned declined to hold a joint trial. He set the trial of the Brownsville defendants for July 18, 1974, and that of petitioner and Sanchez for July 22, 1974 (Pet. App. 19).

On July 19 petitioner testified as a witness at the trial of his brother. He denied that his brother was involved but admitted his own complicity. His brother was acquitted (Pet. App. 19-20).

On July 22 petitioner and Sanchez were brought to trial. Sanchez waived his right to a jury trial; he and the prosecution entered a joint stipulation of facts. The court found him guilty of conspiracy to possess marijuana with intent to distribute and granted the government's motion to dismiss the other count. The court deferred Sanchez's sentencing until the conclusion of petitioner's trial (Pet. App. 20).

Petitioner then waived his right to a jury trial and stipulated that all the witnesses who had participated in his brother's trial would, if called, testify as they had testified previously. After a recess to review its notes of the Brownsville trial, the court found petitioner guilty on both counts (Pet. App. 20).

Sentencing of petitioner and Sanchez followed immediately. A colloquy took place in which the court indicated that during the recess it had read Sanchez's presentence report. Sanchez's presentence report contained (in addition to portions relevant only to Sanchez) the "official version" of the crime, which included the "official version" of petitioner's participation in the crime and a recommendation for sentencing of petitioner, his brother, and Sanchez. This recommendation strongly implied that petitioner and his brother had been deeply involved in large-scale marijuana trafficking in southern Texas for some time (Pet. App. 20-22).

Petitioner argues that the court's exposure to this information in his co-defendant's presentence report, prior to the court's determination of petitioner's guilt or innocence, violated Fed. R. Crim. P. 32(c)(1). The court of appeals correctly held that such exposure, although undesirable, did not violate the Rule (Pet. App. 22). Fed. R. Crim. P. 32(c)(1) expressly refers to a defendant's *own* presentence report. The Rule is not meant to be, nor is it capable of being, a means of preventing background information concerning a particular defendant from coming to the attention of the court by other routes. For example, a defendant whose conviction is reversed on

appeal may be retried before the judge who presided over his first trial and sentenced him after studying his presentence report (*United States* v. *Small*, 472 F.2d 818 (C.A. 3)); similarly, a defendant may be tried before a judge who has presided over his trial and sentenced him on another charge. *Cabrera* v. *United States*, 347 F. Supp. 936 (D. Mass.); *Webster* v. *United States*, 330 F. Supp. 1080 (E.D. Va). See also *United States* v. *Duhart*, 496 F.2d 941 (C.A. 9), certiorari denied, 419 U.S. 967; *Smith* v. *United States*, 360 F.2d 590 (C.A. 5); *Warren* v. *Richardson*, 333 F.2d 781 (C.A. 9). These courts have held that Rule 32(c)(1) means no more than what it says; its strictures are not transgressed unless the court reviews a defendant's own presentence report prior to accepting his plea, receiving a jury's verdict, or rendering its own verdict.

Petitioner's reliance on *Gregg* v. *United States*, 394 U.S. 489, is misplaced. *Gregg* stands for the proposition that literal compliance with Rule 32(c)(1) is required; it did not interpret the meaning of that Rule. See *United States* v. *Duhart*, *supra*, 496 F.2d at 945-946. As the record indicates, the district court did not read petitioner's presentence report prior to its determination of his guilt or innocence; there has, therefore, been literal compliance with the Rule.

Whatever speculative prejudice petitioner may have suffered was, in any event, harmless.[1] Petitioner,

[1] While we agree with the court of appeals' statement (Pet. App. 22-23) that the information concerning petitioner should not have been in Sanchez's presentence report, we do not agree with the court's implication that the district court should not have read Sanchez's presentence report.

"in his brother's trial, had taken the stand and admitted his complicity in the scheme to sell marihuana to the undercover agents. At his own trial he stipulated that if called to the stand he would again admit his guilt. Without abandoning the law and sanity, it would have been impossible for the court to have found [petitioner] innocent" (Pet. App. 23).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

[2] Petitioner argued at trial that the stipulated evidence did not prove possession or conspiracy to possess marijuana, as charged in the indictment, but rather proved distribution and conspiracy to distribute. He now contends (Pet. 12) that the information in Sanchez's presentence report might have dissuaded the district court from accepting this argument. Thus, petitioner asserts, the error could not have been harmless. However, the court of appeals correctly held (Pet. App. 23-24) that there was no variance between indictment and proof. Petitioner is arguing that he was harmed because the information brought to the trial court's attention may have prompted the court to reject an erroneous legal argument. We submit that petitioner suffered no harm, within the meaning of the harmless error rule, because events may have made the court less likely to err.

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